

OFFICE OF THE GENERAL COUNSEL**MEMORANDUM GC 99-9**

November 17, 1999

TO: All Division Heads, Regional Directors, Officers-in-Charge, and Resident Officers**FROM:** Fred Feinstein, General Counsel**SUBJECT:** FOIA Manual and Appendices

The FOIA Manual, sent under separate cover, is being distributed to assist the Regions and Headquarters in properly implementing the Freedom of Information Act, 5 U.S.C. 552 et seq. and to promote uniform application of the FOIA Agency-wide. The Manual rescinds and supersedes all previous GC and OM FOIA Memoranda. The Manual generally is a compilation of existing FOIA practice, with the most notable changes discussed below.

Contents of the FOIA Manual

The Manual includes a Substantive Portion and a Procedural Portion, each with a detailed table of contents. Each Portion has an Appendix, also with a detailed table of contents. The Manual and its Appendices are being distributed in loose-leaf form to simplify change.

- a. The Substantive Portion sets forth pertinent FOIA law, which will help guide Agency employees in making determinations concerning the public release of Agency records under the FOIA. Included in the Substantive Portion is: a section on related statutes (the Federal Records Act and the Privacy Act), a discussion of what constitutes an Agency record, the requirements of the Electronic FOIA Amendments of 1996, and an examination in depth of FOIA Exemptions 2, 4, 5, 6 and 7 -- the exemptions most likely to apply to our files. There is also a section on when disclosure would waive the Agency's ability to claim an exemption, the relationship between 29 C.F.R 102.118, Board and Court subpoenas and the FOIA, and how to assess fees and to determine if fee waiver and/or fee reduction is appropriate. The Appendix to the Substantive Portion contains statutory and regulatory material, including a copy of the FOIA statute and a narrative overview of the FOIA statute.
- b. The Procedural Portion of the FOIA Manual sets forth a detailed "how to" guide that formerly did not exist, and reflects the Agency's experience in processing FOIA requests from intake through Appeals and litigation in the courts. The Manual's processing instructions include direction regarding: threshold procedural issues, creation of a FOIA Docket and File, search techniques, preparation of responsive documents for release and assessment of charges. Further, in order to comply with Executive Order No. 12,600 (Substantive Appendix pp. 13-14), the Procedural Manual, pp. 34-37, sets forth the procedures for FOIA requests for information arguably covered by Exemption 4. In addition, the Manual sets forth the Agency's release policies (including discretionary disclosure, see paragraph 2, infra p. 3) and policies regarding affidavits. However, in order to not unnecessarily burden the Regions, it is recognized (Procedural Manual, p.1) that strict compliance with the Manual, while recommended, is required only in cases where the FOIA determination might be appealed or litigated. Any questions pertaining to Regional compliance with the Procedural Portion should be resolved through discussions among the Region, Operations and Special Litigation.

The Appendix to the Procedural Portion is comprised of sample letters covering various procedural responses as well as sample letters for responding to requests for information covered by FOIA Exemptions 2, 4, 5, 6, and 7. There are also sample letters to reply to requests for affidavits and regarding fee issues. Further, the Appendix contains sample form cover sheets, time logs, inventory forms and redacted documents. In addition, there are the Attorney General FOIA policy statements. Finally, the Appendix includes an Agency Document Index. This Index lists alphabetically documents frequently requested under the FOIA with suggested exemptions and Manual page references.

Some important points regarding the FOIA Manual:

1. The Manual provides for discretionary disclosure of exempt information where the release will not cause any foreseeable

harm, which is at variance with current Regional practice. Except for certain limited categories set forth in the Manual, Headquarters will initially control the disposition of such disclosure. (See Procedural Portion, pp. 38-45).

2. In order to bolster the effectiveness of the confidentiality assurances in Board-Agent affidavits (Procedural Portion, pp. 46-47; Substantive Portion, pp. 60-62), the Manual provides that where witnesses are reluctant to provide affidavits, Board agents will document those concerns and any oral assurances of confidentiality specifically given.
3. There is a policy change with regard to Excelsior Lists. The Manual provides (Procedural Portion, pp. 42-43) that the General Counsel, will no longer, in the exercise of his discretion, disclose to a labor organization a copy of the Excelsior list that had previously been in the possession of that labor organization because to do so would require global disclosure.
4. The Agency's Proposed FOIA Regulations, which will be attached to the Manual, have not been published for notice and comment at this time. These Proposed Regulations change certain Agency procedures currently set forth in the Manual. Those Manual sections that are impacted are indicated by the addition of **bolded** language directing the reader to the revised language in the Proposed FOIA Regulations. When the FOIA Regulations are final, the relevant sections will be revised and forwarded to you.

I encourage you to use this Manual as an important resource and tool in implementing the FOIA and responding to FOIA requests. Any suggestions, requests for clarification and/or corrections should be directed to Abby Propis Simms, Supervisory Attorney, Special Litigation Branch (202-273-2934 or asimms@nrlb.gov).

/s/
F. F.

cc: NLRBU

Release to the Public

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